

**A Matracon Holding BV Anor v Ibrahim Ahmad bin Darvesh
Mohd Deen & Ors**

B HIGH COURT (MIRI) — SUIT NO MYY-22NCvC-7/11 OF 2013
STEPHEN CHUNG J
18 MARCH 2014

C *Companies and Corporations — Auditors — Valuation of shares — Claim for declaration to examine documents of company and Board of Directors — Claim for unauthorised dividends to shareholders of company — Whether there was reasonable cause of action — Whether action frivolous and vexatious — Whether there was serious question to be tried*

D The fourth defendant was a private limited company while the first plaintiff, the first and second defendants were the shareholders of the fourth defendant, each holding 47.5%, 50% and 2.5% of the shares, respectively. The second plaintiff, the first, second and third defendants are the directors of the fourth defendant. The plaintiffs claimed against the first to the third and or fourth defendants, inter alia, for a declaration that the second plaintiff was entitled, pursuant to s 167 of the Act, to examine the statement of accounts, ledgers, cash books, records of receipts, payment transactions, bank statements, used and unused cheque books, all Board of Directors resolutions, minutes of meetings of the Board of Directors, all financial documents and any other records and documents of the fourth defendant. The plaintiff also prayed for the second defendant be ordered to pay a sum of money amounting to 47.5% of RM1.5m to the first plaintiff which was the total sums paid out or taken as unauthorised dividends to the shareholders of the fourth defendant by the second defendant and for an independent auditor to examine and audit the accounts of the fourth defendant. The defendants submitted that the plaintiffs' claims did not disclose a reasonable cause of action; the action was frivolous and vexatious; there was no serious question to be tried; and the application must be dismissed with costs.

H **Held**, dismissing the applications:

I (1) The prayers tantamount to mandatory injunctions and interfere with the internal management of the fourth defendant. The court is slow to grant a mandatory interlocutory injunction because the plaintiff would in substance obtain the reliefs that he sought in the suit. The plaintiffs, in addition to the tests required in a prohibitory injunction would have to show that the case had a higher probability of success at the trial of the action (see para 35).

- (2) The directors of the company may appoint a person to be the auditor of the company and any auditor so appointed shall hold office until the conclusion of the next annual meeting of the company. If the directors do not appoint an auditor, the company at the general meeting may do so. Therefore an ordinary shareholder is not entitled to appoint a person to audit the account of the company, in particular where the directors or the company have already appointed an auditor of the company (see para 36). A
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- (3) The directors have appointed the auditor of the company. The auditor so appointed must be given the opportunity to carry out its responsibility in the audit. There is no reason and no basis for the first and or second plaintiff to appoint or apply to the court to appoint another auditor to audit the accounts of the company. In any event the first plaintiff has not justified the necessity to appoint another auditor to carry out the audit (see para 37). C
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- (4) If there was any complaint of incompetence or prejudice against the appointed auditor, s 172(4) of the Act provides for the auditor to be removed by resolution of the company at a general meeting. However the plaintiffs have not applied to remove the auditor of the company (see para 38). E

[Bahasa Malaysia summary]

Defendan keempat adalah syarikat sendirian berhad manakala plaintiff pertama, defendan pertama dan kedua adalah pemegang saham defendan pertama, masing-masing memegang 47.5%, 50% dan 2.5% saham. Plaintiff kedua, pertama, defendan kedua dan ketiga adalah pengarah defendan keempat. Plaintiff-plaintiff menuntut terhadap defendan pertama hingga ketiga dan atau keempat, antara lain, untuk deklarasi bahawa plaintiff kedua berhak, menurut s 167 Akta, untuk memeriksa penyata akaun, lejer, buku tunai, rekod resit, transaksi bayaran, penyata bank, buku cek digunakan atau tidak digunakan, resolusi lembaga pengarah, minit mesyuarat lembaga pengarah, kesemua dokumen kewangan dan apa-apa rekod dan dokumen defendan keempat. Plaintiff-plaintiff juga memohon untuk defendan kedua diperintahkan untuk membayar sejumlah wang bernilai 47.5% daripada RM1.5m kepada plaintiff pertama di mana keseluruhan jumlah dibayar atau diambil sebagai dividen pemegang saham defendan keempat yang tidak disahkan oleh defendan kedua dan untuk auditor bebas memeriksa dan mengaudit akaun defendan keempat. Defendan-defendan mengemukakan bahawa tuntutan plaintiff-plaintiff mendedahkan kausa tindakan munasabah; tindakan adalah remeh dan menyusahkan; tiada isu yang serius untuk dibicarakan; dan permohonan hendaklah ditolak dengan kos. F
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Diputuskan, menolak permohonan:

- A (1) Permohonan bersamaan kepada injunksi mandatori dan mencampuri pentadbiran dalaman defendan keempat. Mahkamah adalah perlahan untuk memberikan injunksi interlokutori mandatori kerana plaintif-plaintif secara substantif mendapatkan relief-relief yang dipohon di dalam guaman. Plaintif-plaintif, sebagai tambahan kepada pemeriksaan yang diperlukan dalam injunksi halangan perlu untuk menunjukkan bahawa kes itu mempunyai kebarangkalian untuk berjaya sewaktu perbicaraan tindakan itu (lihat perenggan 35).
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- C (2) Pengarah syarikat boleh melantik seseorang untuk menjadi auditor syarikat dan mana-mana auditor hendaklah memegang jawatan itu sehingga kesimpulan daripada mesyuarat tahunan syarikat yang seterusnya. Jika pengarah-pengarah tidak melantik seorang auditor, syarikat sewaktu mesyuarat am boleh berbuat demikian. Oleh itu seorang pemegang saham biasa tidak berhak untuk melantik seseorang untuk mengaudit akaun syarikat, terutama apabila pengarah-pengarah syarikat telahpun melantik auditor syarikat (lihat perenggan 36).
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- E (3) Pengarah-pengarah telah melantik auditor syarikat. Auditor yang dilantik hendaklah diberi peluang untuk menjalankan tanggungjawabnya di dalam audit. Tiada sebab dan dasar untuk plaintif pertama dan kedua untuk melantik atau memohon kepada mahkamah untuk melantik satu lagi auditor untuk mengaudit akaun syarikat. Dalam apa-apa keadaan plaintif pertama tidak menjustifikasikan keperluan untuk melantik satu lagi auditor untuk menjalankan audit (lihat perenggan 37).
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- G (4) Jika terdapat apa-apa aduan terhadap ketidakcekapan atau prejudis terhadap auditor yang dilantik, s 172(4) Akta memperuntukan bagi auditor untuk dikeluarkan daripada resolusi syarikat di mesyuarat am. Walau bagaimanapun, plaintif-plaintif tidak memohon untuk mengeluarkan auditor syarikat (lihat perenggan 38).]

Notes

For a case on valuation of shares, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 74.

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Cases referred to

Air Marketing Asia Pacific Pty Ltd v Damai Puri Resort & Spa Sdn Bhd & Anor [2011] MLJU 207 ; [2011] 1 LNS 159, HC (refd)

Associated Newspapers Group Inc plc v Insert Media Ltd and others [1988] 2 All ER 420, Ch D (refd)

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Compagnie Generale Des Eaux v Compagnie Generale Des Eaux Sdn Bhd [1993] 1 MLJ 55, HC (refd)

Dato' Tan Kim Hor & Ors v Tan Chong Consolidated Sdn Bhd [2004] 1 MLJ 690, HC (refd)

- Gateway Land Pte Ltd v Turner (East Asia) Pte Ltd* [1988] 1 MLJ 416 (refd) A
Kasturi Palm Products v Palmex Industries Sdn Bhd [1986] 2 MLJ 310 (refd)
Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193, CA (refd)
Marina bte Mohd Yusoff v Pekeliling Triangle Sdn Bhd (receiver and manager appointed) [2008] 1 MLJ 317 ; [2008] 1 CLJ 169, CA (refd) B
Quality Tractors (M) Sdn Bhd v United Asian Bank Bhd [1980] 1 MLJ 95 (refd)
Raju Rajaram Pillai (t/a Dhanveer Enterprise) v MMC Power Sdn Bhd & Anor [2000] 6 MLJ 551 ; [2000] 4 CLJ 189, HC (refd)
S & S Power Switchgear Ltd lwn Toprank Corp Sdn Bhd [2005] 2 MLJ 69, HC (refd) C
Owners of cargo lately laden on board the vessel Siskina and others v Distos Compania Naviera SA; The Siskina [1977] 3 All ER 803, CA (refd)
Timbermaster Timber Complex (Sabah) Sdn Bhd v Top Origin Sdn Bhd [2002] 1 MLJ 33 ; [2002] 1 CLJ 566, CA (refd) D

Legislation referred to

Companies Act 1965 ss 8, 131B(1), 167, 167(3), (6), 170(1), 172(1), 172(4)
 Rules of Court 2012 O 29 r 1(1), (2)

Ranbir Singh (Patrick Liaw with him) (Ranbir S Sangha & Co) for the plaintiff.
Sandhu (Kalveet Sandhu with him) (Sandhu & Co) for the defendants. E

Stephen Chung J

RULING F

[1] There are three applications heard jointly before the court as follows:

- (a) In encl 2, the first and second plaintiffs applied that the first, second, third and fourth defendants, inter alia, be restrained from removing from Malaysia, selling, disposing or dealing with the assets of the fourth defendant or from withdrawing any money from any of the fourth defendant's bank accounts save for the purpose of daily expenses or operations or payments of remuneration of the employees of the fourth defendant. G H
- (b) In encl 13, the first, second and third defendants applied that the writ and statement of claim dated 18 November 2013 or alternatively that prayers (1), (2), (3), (4) to (7), (8) and (9) therein be struck out on the grounds that they disclose no reasonable cause of action against the said defendants as pleaded under s 167 of the Companies Act 1965 or is scandalous, frivolous or vexatious or is otherwise an abuse of the process of court. I
- (c) In encl 23, the defendants applied that the plaintiffs shall give security for

- A costs in the sum of RM350,000 or such costs as the court deems just on the grounds that the first plaintiff is an foreign company, that the second plaintiff is a foreigner not ordinarily resident within the jurisdiction, that both plaintiffs have no known assets within the jurisdiction and that the defendants have a good defence to this action and if successful, will not be able to recover their costs against the plaintiffs within the jurisdiction.
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- [2] The fourth defendant is a private limited company incorporated under the Act with its registered address at Lot 102, Mile 1, Kuala Baram Road, Miri. The first plaintiff, first defendant and the second defendant are the shareholders of the fourth defendant, each holding 47.5%, 50% and 2.5% of the shares respectively in the fourth defendant. The second plaintiff, the first, second and third defendants are the directors of the fourth defendant.
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- [3] In the statement of claim the plaintiffs claimed against the first to the third and or fourth defendants, inter alia, for a declaration that the second plaintiff, his agents, are entitled pursuant to s 167 of the Act to examine the statement of accounts, ledgers, cash books, records of receipts, payment transactions, bank statements, used and unused cheque books, all Board of Directors resolutions, minutes of meetings of the board of directors, all financial documents and any other records and documents of the fourth defendant from 1 January 2006 until the date of judgment or from such earlier date as necessary until the date of judgment; for a prayer that the second defendant be ordered to pay a sum of money amounting to 47.5% of RM1.5m to the first plaintiff which was the total sums paid out or taken as unauthorised dividends to the shareholders of the fourth defendant by the second defendant; and for an independent auditor to examine and audit the accounts of the fourth defendant.
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- [4] In respect of encl 2, the threshold test to be applied in an application for an interlocutory injunction is that the court must first be satisfied that a claim is not frivolous or vexatious in that there is a serious question to be tried. If a serious question to be tried has been raised, the next question is whether damages would be an adequate remedy, either by the grant or refusal of the interlocutory injunction to either party. If there is a doubt as to the adequacy of damages as a remedy, then the question of balance of convenience has to be considered: *Marina bte Mohd Yusoff v Pekeliling Triangle Sdn Bhd (receiver and manager appointed)* [2008] 1 MLJ 317; [2008] 1 CLJ 169, *Keet Gerald Francis Noel v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193.
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- I [5] The facts showed that the prayers in encl 2 were, inter alia, for interlocutory injunctions against the defendants whereas in the statement of claim the plaintiffs prayed that they were entitled to examine the financial records of the fourth defendant; for a sum amounting to 47.5% of RM1.5m be

paid to the first plaintiff; for the son of the second plaintiff be appointed as his alternate directors; and for an independent auditor be appointed to audit the accounts of the fourth defendant. The prayers in encl 2 were very different from those in the statement of claim. In the statement of claim the plaintiffs did not pray for any injunctions against the defendants. The question is whether the plaintiffs were entitled to apply for the injunctions in encl 2 although they were not prayed for in the statement of claim.

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[6] The defendants submitted that the plaintiffs' claims against the defendants as pleaded did not disclose a reasonable cause of action. It was submitted that the prayers in encl 2 were different from those pleaded in the statement of claim and therefore the prayers in the statement of claim did not support the prayers for injunctions in encl 2. The defendants submitted that a plaintiff who prayed for an injunction must have some cause of action to support it, which the plaintiffs in this case have failed to do so: see *Owners of cargo lately laden on board the vessel Siskina and others v Distos Compania Naviera SA; The Siskina* [1977] 3 All ER 803, *Associated Newspapers Group Inc plc v Insert Media Ltd & Ors* [1988] 2 All ER 420.

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[7] The defendants therefore submitted that the plaintiffs' application was frivolous and vexatious, there was no serious question to be tried and the application in encl 2 must be dismissed with costs.

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[8] O 29 r 1(1) of the Rules of Court 2012 provides that an application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in the party's originating process, counterclaim or third party, as the case may be. Sub-rule (2) provides that such application may be made by a notice of application supported by an affidavit setting out the facts giving rise to the claim and the facts giving rise to the application for interim injunction.

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[9] Having perused the plaintiffs' application and affidavits in support, the plaintiffs' application was within the provisions of O 29 r 1(1) and (2) notwithstanding that the prayers for injunctions were not included in the plaintiffs' statement of claim. The question is whether the plaintiffs were entitled to the interlocutory injunctions prayed for.

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[10] I refer to the statement of claim. In paras 11–37 of the statement of claim, the plaintiffs pleaded that the second plaintiff was recovering from a by-pass and intended his son to replace him as a director of the fourth defendant in future. By a letter dated 28 May 2013, the second plaintiff requested the other directors to appoint his son Sebastiaan as his alternate director in the fourth defendant and for an external audit of the fourth

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A defendant. The plaintiffs pleaded that the directors did not respond or did not agree to the requests.

B [11] The plaintiffs pleaded and affirmed that on 15 August 2013 they called for a Board of Directors' meeting and shareholders' meeting and notice of meetings was issued and scheduled for 4 September 2013 but the other shareholders and directors did not attend the meetings. The plaintiffs complained that the meetings could not be convened due to lack of quorum because the first to the third defendants requested that the meetings be rescheduled. The plaintiffs called for another meeting of the directors and shareholders which were scheduled on 18 September 2013 but the other directors and shareholders again failed to attend the meetings.

C [12] The plaintiffs called for such meetings again, scheduled on 25 September 2013, which were attended by all the shareholders and directors. The plaintiffs pleaded and affirmed that at the meetings the other shareholders and directors did not agree to his requests to appoint his son as his alternate director and for the external audit to be carried out. The plaintiffs complained that the first and second defendants had unreasonably withheld their consent to the appointment and the external audit and that it was not in the best interest of the fourth defendant.

D [13] In para 24 of the statement of claim, the plaintiffs pleaded that on 2 September 2013 the second plaintiff went to the premises of the fourth defendant to find out more information regarding the financial status of the fourth defendant but was refused by the group chief financial officer (CFO). These were also pleaded in paras 67–72 of the statement of claim. The plaintiffs complained that as a result of the actions of the first to third defendants and the CFO, they had not been able to inspect the financial records of the fourth defendant. The plaintiffs complained that however the financial records were shown to Ekuiti Nasional Bhd for the purpose of making an acquisition proposal, without their knowledge and consent, whereas they were not allowed to inspect the same.

E [14] In paras 38–49 of the statement of claim, the plaintiffs pleaded that on 9 October 2013 they discovered that the defendants had made two unauthorised payments amounting to RM1.5m purportedly as dividends to the second defendant via his personal bank account based on a circular resolution signed by the first to the third defendants in respect of a payment of RM500,000 but that there was no resolution to authorise the other payment of RM1m to the second defendant. The plaintiffs complained that there was no meeting to authorise the payments, they were not informed and did not agree to the payments.

[15] In paras 50–58 of the statement of claim, the plaintiffs also pleaded and affirmed that they found out that there was a demand made against the fourth defendant for RM3.1m being the outstanding rentals due to Syarikat Sribima Sdn Bdn (SSSB). The plaintiffs pleaded that the claim was not legitimate, that the rentals were not due to SSSB and that there was a conflict of interest because the first defendant was the majority shareholder and director of SSSB.

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[16] In paras 59–66 of the statement of claim, the plaintiffs pleaded that between 15–22 October 2013, they discovered that, over a period, petty cash amounting to RM2.5m was paid to the first defendant for his personal expenses, including to his wife, furniture for the CEO's house and for the children of the second defendant.

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[17] In paras 73–78 of the statement of claim, the plaintiffs pleaded that they found out that the defendants had begun ordering the destruction of critical documents and records in order to conceal the wrong doings in the fourth defendant.

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[18] The plaintiffs pleaded and submitted that the defendants had failed to exercise good governance and had abused their powers as shareholders and directors of the fourth defendant. It was pleaded and submitted that the actions of the defendants were irregular, unlawful, had deprived the plaintiffs of their rights as a shareholder and or a director of the fourth defendant and had caused substantial financial loss to the plaintiffs as direct and indirect shareholder of the fourth defendant.

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[19] The plaintiffs submitted that unless restrained by a court order, there was a real risk that the defendants would withdraw moneys of the fourth defendant to pay SSSB owned by the first defendant and that the assets of the fourth defendant would be dissipated by the defendants to satisfy the alleged claim. The plaintiffs also prayed that 47.5% of the sums of RM1.5m be paid to the first plaintiff.

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[20] The first, second and third defendants denied the allegations made by the plaintiffs. They averred that since 1988 all the shareholders agreed that all profits in the fourth defendant be paid out to them in equal shares of one-third each, notwithstanding their actual shareholdings in the fourth defendant.

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[21] The first, second and third defendants averred that under the shareholders agreement dated 7 July 2008, it was agreed that (a) for a quorum for a meeting of the board of directors it is mandatory for all directors to be present, and (b) all decisions and resolutions of the board of directors shall be carried with consensus or agreement of all the shareholders. It was averred that a circular resolution was passed and signed to approve the alterations to the

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A memorandum and articles of association (M & A) of the fourth defendant to incorporate the above agreements.

B [22] The first, second and third defendants averred that there was a breakdown in the relationship of the shareholders and directors of the fourth defendant in May 2013 over the second plaintiffs demand to appoint Sebastiaan as his alternate director which they did not agree and which resulted in the plaintiffs commencing this action.

C [23] The first, second and third defendants pleaded that by reason of the matter stated above, they prayed for a declaration that the requirements on the quorum and unanimous agreement are no longer binding upon the parties and the same were ineffective, null and void.

D [24] On 19 November 2013, based on the certificate of urgency the court has granted the ex parte injunctions in term of prayers 1(a), (b), (c), (d), (e), (f) and (g) only of encl 2. The court did not grant the other prayers in terms and ruled that the parties should address the court on the merits of the other prayers in encl 2. The court in granting the ex parte injunctions has taken into account that the plaintiffs have given the usual undertaking as to damages and costs.

E [25] Pursuant to s 170(1) of the Act, a shareholder is entitled to be given a copy of the profit and loss account, balance sheet and auditor's report which are to be laid before a company in general meeting. There is no provision in the act for a shareholder to inspect or to appoint his auditor or agent to demand to inspect and be given a copy of all financial accounts or records or documents of the company.

F [26] Section 167 of the Act requires a company to keep and maintain such accounting and other records to be kept at the registered office or at such other place as the directors think fit and shall at all times be open to inspection by the directors. The second plaintiff being a director of the company was and is at all times entitled to inspect the accounting records of the company. In the event the second plaintiff was prevented from doing so by any of the defendants or the servants or agents of the fourth defendant, they would have breached the provisions of s 167(3) of the Act.

G [27] However, in this case, the second plaintiff sought an order of the court that the records be inspected by the second plaintiffs agents. Section 167(6) provides that the court may in any particular case order that the accounting and other records of a company be open for inspection by an approved company auditor acting for a director, but only upon an undertaking in writing given to the court that information acquired by the auditor during his inspection shall not be disclosed by him except to that director.

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[28] An approved company auditor means a person approved as such by the Minister under s 8 of the Act whose approval has not been revoked. He must be prepared to furnish an undertaking in writing to the court under s 167(6) of the Act. In the event that the undertaking given by an auditor is not addressed to the court, the court may not order that the accounting and other records be open for inspection by the approved company auditor: see *Dato' Tan Kim Hor & Ors v Tan Chong Consolidated Sdn Bhd* [2004] 1 MLJ 690.

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[29] The plaintiffs' application in prayers 1(e) and (f) in encl 2 for the second plaintiffs agents to inspect and make copies of the accounting records did not come within the provisions of ss 167(6) and 170(1) of the Act.

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[30] On 2 December 2013, during the inter partes hearing, the parties agreed that the word 'agents' in prayer 1(e) and (f) be amended to read 'approved company auditor acting for the second plaintiff subject to the undertaking in s 167(6) of the Act'. The plaintiffs were given 14 working days from 2 December 2013 to carry out and complete the inspection of the records and financial documents of the fourth defendant. The plaintiffs' approved company auditor had inspected the records and financial documents of the fourth defendant. At this juncture, there is no necessity for further inspection or for restraining orders in terms of prayer 1(e) and (f) of encl 2 against the defendants and the same are discharged. Similarly, prayer 92(1) of the statement of claim is redundant and struck out.

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[31] On 20 January 2014, learned counsel for the plaintiffs abandoned prayers 92 (2), (3) and (8) of the statement of claim. The defendants did not object to this application and the same were struck out.

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[32] Since the bulk of the pleadings of the plaintiffs in the statement of claim were in respect of and in support of the plaintiffs' claims in prayers 92(2), (3) and (8) therein and once the plaintiffs have abandoned prayers 92(2), (3) and (8) of the statement of claim, there was no basis for the injunctions prayed for in prayer (1)(a), (b), (c), (d) and (g) of encl 2.

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[33] In prayers 2 and 3 of encl 2, the plaintiffs prayed that all future monies received by the defendants or on behalf of the fourth defendant shall be deposited into a new bank account of the fourth defendant to be opened with OCBC Bank, Miri to be operated jointly by all the three shareholders of the fourth defendant. In prayers 4 and 5, the plaintiffs prayed that any payments and petty cash of RM10,000 only per month from the existing bank accounts of the fourth defendant must be supported with full particulars of nature of business, sources of funds, amounts to be paid, intended recipients, purposes of payments together with supporting documents to be furnished to the plaintiffs' solicitors. In prayer 6, the plaintiff prayed that certain individuals acting as

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A security guards be removed or dismissed forthwith from the premises of the fourth defendant.

[34] Section 131B(1) of the Act states that the business and affairs of a company must be managed by, or under the direction of, the board of directors. Subsection (2) provides that the board of directors has all the powers necessary for managing and for directing and supervising the management of the business and affairs of the company subject to any modification, exception or limitation contained in this Act or in the M & A of the company. The opening of bank accounts, the operation of its bank accounts, the payments of its expenses and salaries to its employees and to creditors are matters for the directors and management of the fourth defendant. The courts are reluctant to interfere with the internal management of the company:

[35] From a reading of these prayers and the averments, the defendants, their servants, agents or representatives are required to comply or carry out these demands irrespective of the decisions of the management or directors of the company. These prayers tantamount to mandatory injunctions and interfere with the internal management of the fourth defendant. The court is slow to grant a mandatory interlocutory injunction because the plaintiff will in substance obtain the reliefs that he seeks in the suit. The plaintiffs in addition to the tests required in a prohibitory injunction would have to show that the case has a higher probability of success at the trial of the action: see *Timbermaster Timber Complex (Sabah) Sdn Bhd v Top Origin Sdn Bhd* [2002] 1 MLJ 33 ; [2002] 1 CLJ 566, *Marina bte Mohd Yusoff v Pekeliling Triangle Sdn Bhd (receiver and manager appointed)*. At this juncture the plaintiffs have failed to do so. Therefore prayers 2, 3, 4, 5 and 6 of encl 2 are refused.

[36] In respect of prayers 92 (4), (5), (6), (7) and (9) in the statement of claim, under s 172(1) of the Act, the directors of the company may appoint a person to be the auditor of the company and any auditor so appointed shall hold office until the conclusion of the next annual meeting of the company. If the directors do not appoint an auditor, the company at the general meeting may do so. Therefore an ordinary shareholder is not entitled to appoint a person to audit the account of the company, in particular where the directors or the company have already appointed an auditor of the company.

[37] In this case the directors have appointed Ernest & Young as the auditor of the company. The auditor so appointed must be given the opportunity to carry out its responsibility in the audit. There is no reason and no basis for the first and or second plaintiff to appoint or apply to the court to appoint another auditor to audit the accounts of the company. In any event the first plaintiff has not justified the necessity to appoint another auditor to carry out the audit.

[38] In the event the audit carried out was not satisfactory, any issues thereto should be resolved at the directors' meeting and or at the AGM or EGM of the company. If there was any complaint of incompetence or prejudice against the appointed auditor, s 172(4) provides for the auditor to be removed by resolution of the company at a general meeting. However the plaintiffs have not applied to remove the auditor of the company. Based on the pleadings and the facts, there was no basis for prayers 92 (4), (5), (6), (7) and (9) in the statement of claim and the same are struck out.

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[39] For the reasons given, the defendants' application to strike out the prayers in para 92 in encl 13 is allowed with costs of RM2,000 to be paid by the plaintiffs.

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[40] In encl 23, in such an application, the onus of proving that the plaintiff is ordinarily resident outside the jurisdiction is on the defendant. It is a question of fact and degree. A company not registered in Malaysia is considered not to be within the jurisdiction: *Compagnie Generale Des Eaux v Compagnie Generale Des Eaux Sdn Bhd* [1993] 1 MLJ 55.

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[41] In this case, it is not in dispute that the first plaintiff is a company incorporated in Holland and the second plaintiff is a foreigner not ordinarily resident in Malaysia. Notwithstanding that the security for costs cannot be ordered as of right from a foreign company or a foreigner, the court has a discretion whether to order security for the defendants' costs. It has to consider whether it is just to do so or whether it would be oppressive to the plaintiffs: *Kasturi Palm Products v Palmex Industries Sdn Bhd* [1986] 1 MLJ 110, *S & S Power Switchgear Ltd v Toprank Corp Sdn Bhd* [2005] 2 MLJ 69, *Gateway Land Pte Ltd v Turner (East Asia) Pte Ltd* [1988] 1 MLJ 416, *Quality Tractors (M) Sdn Bhd v United Asian Bank Bhd* [1980] 1 MLJ 95.

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[42] The plaintiffs have applied for interlocutory injunctions against the defendants. The plaintiffs have given the usual undertaking as to damages and costs. For the reasons given, the court has struck out prayers 92 in the statement of claim. Therefore, it is right that the plaintiffs should provide the security for costs bearing in mind that they are ordinarily outside the jurisdiction of the court. The sum of security for costs of RM35,000 is fair and not oppressive: *Raju Rajaram Pillai (t/a Dhanveer Enterprise) v MMC Power Sdn Bhd & Anor* [2000] 6 MLJ 551; [2000] 4 CLJ 189, *Air Marketing Asia Pacific Pty Ltd v Damai Puri Resort & Spa Sdn Bhd & Anor* [2011] MLJU 207; [2011] 1 LNS 159. The plaintiffs shall deposit this sum in an interest bearing account with the court within 14 days.

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A *Applications dismissed.*

Reported by Afiq Mohamad Noor

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